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No. _____

IN THE

Supreme Court of the United States

October Term, 1995

ROBERT BANDURA,

Petitioner,

vs.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. When evaluating eligibility for a discretionary waiver of a ground of deportation, may the Board of Immigration Appeals consider an untimely filed and unauthenticated purported criminal history entered into evidence following a deportation hearing?

2. Is an applicant for a waiver of a ground of deportation denied his due process right to a full and fair hearing by his attorney's failure to timely object to the admission of an untimely filed and unauthenticated purported criminal history?

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Robert Bandura, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion

of the United States Court of Appeals for the Ninth Circuit entered in this action on November 2, 1995.

OPINIONS BELOW

The Memorandum Decision of the United States Court of Appeals for the Ninth Circuit entered in this case on November 2, 1995, is reprinted in the Appendix to this Petition at pages A-1 to A-4. The decision and order of the Board of Immigration Appeals (BIA), filed on April 7, 1994, are reprinted in the Appendix to this Petition at pages B-1 to B-10. The dissenting opinion of the Acting Chairman of the BIA, filed on April 7, 1994, is reprinted in the Appendix to this Petition at pages B-11 to B-12. The decision and order of the Immigration Judge (IJ), dated June 4, 1992 (signed June 8, 1992), are reprinted in the Appendix to this Petition at pages C-1 to C-5.

BASIS FOR JURISDICTION

The United States Court of Appeals for the Ninth Circuit entered its Memorandum Decision on November 2, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves section 241(a)(2)(B)(i) of the Immigration and Nationality Act (INA), as amended, 8 U.S.C. § 1251(a)(2)(B)(i), regarding aliens convicted of a violation of law relating to a controlled substance. This case also involves INA § 212(c), 8 U.S.C. § 1182(c), which in relevant part, authorizes the Attorney General to waive certain specified grounds of exclusion for a lawful permanent resident with seven consecutive years of lawful unrelinquished domicile who seeks to return to the United States after traveling abroad. This section has been interpreted to apply to lawful permanent residents with the requisite seven years of domicile, who, like the petitioner, have not left the United States subsequent to their criminal convictions, and are charged with being deportable on grounds that are comparable to the specified grounds of exclusion. The specific relevant provisions of the United States Code are as follows:

8 U.S.C. § 1182(c)

(a) CLASSES OF EXCLUDABLE ALIENS. - Except as otherwise provided in this chapter, the following describes classes of excludable aliens who are ineligible to receive

visas and who shall be excluded from admission into the United States: [. . .]

(c) NONAPPLICABILITY OF SUBSECTION (a)
Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to the provisions of subsection (a) (other than paragraphs (3) [security and related grounds] and (9)(C) [international child abduction]). Nothing contained in this subsection shall limit the authority of the Attorney General to exercise the discretion vested in him under section 1181(b) of this title. The first sentence of this subsection shall not apply to an alien who has been convicted of one or more aggravated felonies and has served for such felony or felonies a term of imprisonment of at least 5 years.

8 U.S.C. § 1251(a)(2)(B)(i)

(a) CLASSES OF DEPORTABLE ALIENS. - Any alien (including an alien crewman) in the United States shall, upon the order of the Attorney General, be deported if the alien is within one or more of the following classes of deportable aliens: [. . .]

(2) CRIMINAL OFFENSES. - [. . .]

(B) CONTROLLED SUBSTANCES. -
(i) CONVICTION. - Any alien who at any time after entry has been convicted of a violation of (or a conspiracy or attempt to

> violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable.

STATEMENT OF THE CASE

The petitioner, Robert Bandura, is a forty-four year old citizen and national of Canada. He entered the United States as a lawful permanent resident on March 2, 1953, at the age of fifteen months. Mr. Bandura has been a lawful permanent resident of the United States for almost forty three years.

An Order to Show Cause was issued by the Immigration and Naturalization Service (INS) on April 25, 1991, charging Mr. Bandura with deportability under INA § 241(a)(2)(B)(i), 8 U.S.C. § 1251(a)(2)(B)(i), based on a controlled substances conviction (unlawful possession of controlled substances -- cocaine and methamphetamine). At the deportation hearing, Mr. Bandura admitted the allegations and conceded deportability, and applied for a waiver of deportability under INA § 212(c), 8 U.S.C. § 1182(c), based on his thirty nine years (at that time) of unrelinquished

domicile. At the conclusion of Mr. Bandura's hearing, the IJ indicated that he would withhold his decision until May 1, 1992, in order to allow the INS time to file additional evidence that purported to show Mr. Bandura's involvement in criminal activity. The INS failed to file additional evidence by the May 1, 1992 deadline.

By decision dated June 4, 1992, but signed June 8, 1992, the IJ found Mr. Bandura deportable and denied his application for a waiver of deportability. The decision was not mailed until June 15, 1992. Subsequent to the IJ's decision, the INS submitted a compilation of unauthenticated documents of unknown origin. The unauthenticated documents were not considered by the IJ. Although Mr. Bandura, through prior counsel, filed a timely notice of appeal to the BIA on June 25, 1992, Mr. Bandura's prior counsel failed to file a motion or memorandum objecting to the INS's submission of the unauthenticated documents and their eventual inclusion within the administrative record.

On appeal, the BIA expressly relied on the unauthenticated documents, in addition to the arrests and convictions which were properly considered by the IJ, in determining that Mr. Bandura did not warrant a favorable

grant of discretion regarding his waiver application pursuant to INA § 212(c), 8 U.S.C. § 1182(c). A timely petition for review was filed with the United States Court of Appeals for the Ninth Circuit on July 5, 1994. The Ninth Circuit had jurisdiction pursuant to INA § 106(a), 8 U.S.C. § 1105a(a). On November 2, 1995, the Ninth Circuit dismissed Mr. Bandura's appeal in a Memorandum Decision.

REASONS FOR GRANTING THE PETITION

I. THIS COURT SHOULD GRANT THE PETITION FOR WRIT OF CERTIORARI BECAUSE THE ADMISSION AND CONSIDERATION BY THE BOARD OF IMMIGRATION APPEALS OF THE UNTIMELY FILED AND UNAUTHENTICATED PURPORTED CRIMINAL HISTORY OF MR. BANDURA IS PREJUDICIAL AND CONSTITUTES REVERSIBLE ERROR.

On April 1, 1991, the INS issued an Order to Show Cause charging Mr. Bandura with deportability under INA § 241(a)(2)(B)(i), 8 U.S.C. § 1251(a)(2)(B)(i), for conviction of a crime relating to possession of a controlled substance. At his March 23, 1992 deportation hearing, Mr. Bandura conceded deportability and applied for relief from deportation under INA § 212(c), 8 U.S.C. § 1182(c). At the close of the hearing, counsel for the INS requested additional time to

submit evidence of other purported criminal convictions of Mr. Bandura. The IJ granted the request, and gave the INS until May 1, 1992 in which to submit said evidence. On June 8, 1992, the IJ signed an order denying Mr. Bandura relief from deportation. Subsequent to the IJ's decision, on June 12, 1992, the INS submitted a compilation of unauthenticated documents purporting to be Mr. Bandura's criminal record. The IJ's decision was mailed on June 15, 1992.

On June 25, 1992, Mr. Bandura filed an appeal directed to the BIA, asserting that the IJ erred in failing to fully and fairly balance Mr. Bandura's equities, having given too much weight to negative factors and insufficient weight to positive ones.

The BIA rendered its decision in this matter on April 7, 1994. It noted Mr. Bandura's long-term residence in this country and his ties to his family in this country, and found these factors to be unusual and outstanding equities necessary to offset a serious criminal record. Other equities noted by the BIA were Mr. Bandura's steady work history and his participation in alcohol rehabilitation since his release from prison. In addition, he has worked as a residential property

manager for properties owned by his mother in the Portland, Oregon area, and his continued employment is virtually assured.

Against these positive equities, the BIA reviewed Mr. Bandura's criminal history, including explicit review of the purported criminal history submitted by the INS after the hearing before the IJ. On the basis of these negative factors, the BIA affirmed the IJ's denial of relief from deportation.

On July 5, 1994, Mr. Bandura filed a timely petition for review to the Ninth Circuit. However, on November 2, 1995, in a memorandum opinion, the Ninth Circuit denied Mr. Bandura's petition. The Ninth Circuit determined that the list of convictions could properly be considered as part of the record because Mr. Bandura had neither objected to their admission nor petitioned the BIA for a rehearing.

The Ninth Circuit also dismissed Mr. Bandura's argument that he was denied due process because he could not confront the evidence against him. The Ninth Circuit determined that there was no resulting prejudice.

Finally, the Ninth Circuit determined the admissibility of the purported criminal history in terms of its character as hearsay evidence, and found it admissible. Hearsay evidence

is generally admissible in deportation proceedings so long as it is probative and its admission is not fundamentally unfair. *Espinoza v. INS*, 43 F.3d 308, 310 (9th Cir. 1995).

However, some form of authentication is required to establish the reliability, and hence, probativeness of any documents submitted. *Iran v. INS*, 656 F.2d 469, 472 (9th Cir. 1981). In the present case, the documents submitted were not authenticated.

The BIA overtly gave great weight to these unauthenticated documents, stating:

> His [Bandura's] disrespect for our traffic laws and defiance in the face of a court-ordered prohibition against driving make the respondent undesirable as a resident in the United States . . . . This overall record is serious enough to tip the scales against him for denial of section 212(c) [8 U.S.C. § 1182(c)] relief.

The consideration of the unauthenticated evidence is improper because Mr. Bandura never had the opportunity to directly challenge its inclusion, the evidence was submitted by the INS after the deadline imposed by the IJ, and the probativeness of the unauthenticated evidence was never tested. The inclusion of improper factors in reaching a

discretionary decision ordinarily constitutes grounds for remand. *Yepes-Prado v. INS*, 10 F.3d 1363, 1366 (9th Cir. 1993). This should have been the rule guiding the Ninth Circuit's decision.

Mr. Bandura has suffered substantial prejudice from both the admission of the unauthenticated criminal record, and from the subsequent and related failure of the BIA to properly weigh the equities in Mr. Bandura's case. He has been denied his constitutional right to a fair hearing and due process of law.

Even with the presence of serious negative factors, an alien may meet his burden of meriting a favorable exercise of discretion by possessing unusual or outstanding equities. *Matter of Edwards*, Int. Dec. #3134 (BIA May 2, 1990); *Matter of Buscemi*, 19 I&N 628, 633 (BIA 1988). Mr. Bandura has substantial liberty and property interests at stake. Mr. Bandura has been a lawful permanent resident of the United States for almost forty three years. He was moved to the United States by his adoptive parents and raised in the United States by them since he was fifteen months old. Mr. Bandura has no relations with his biological parents, and as the BIA noted, he is very close to his adoptive mother.

His only known relatives are his adoptive parents and adoptive siblings, all of whom reside in the United States. He has no significant ties to Canada.

Mr. Bandura unquestionably has a favorable balance of equities. The denial of the requested relief would result in the permanent separation of Mr. Bandura from his family, as well as permanent exile from this country. INA § 212(c), 8 U.S.C. § 1182(c), is a generous provision of immigration law ensuring family unification and other humanitarian objectives. *Castillo-Felix v. INS*, 601 F.2d 459, 465 (9th Cir. 1979). Mr. Bandura, virtually a life-long resident of the United States, is certainly entitled to a proper consideration of his case on the merits.

II. THIS COURT SHOULD GRANT THE PETITION FOR WRIT OF CERTIORARI BECAUSE MR. BANDURA WAS DENIED HIS DUE PROCESS RIGHT TO A FULL AND FAIR HEARING WHEN HIS PRIOR COUNSEL FAILED TO TIMELY OBJECT TO THE ADMISSION OF AN UNTIMELY FILED AND UNAUTHENTICATED PURPORTED CRIMINAL HISTORY.

Mr. Bandura's prior counsel failed to raise an objection before the BIA regarding the submission of the unauthenticated evidence and its subsequent inclusion within

the record. Counsel obviously should have objected on the grounds that the submission was: (1) untimely; (2) unauthenticated; and collaterally, (3) that Mr. Bandura was denied the constitutional right of confrontation by the untimely submission. Counsel's failure to object was noted by the Ninth Circuit in its decision as a virtual waiver of objection to admission of the unauthenticated documents. Failure to timely raise defenses by counsel, if such failure is prejudicial, is reversible error under the Fifth Amendment. *See Magallanes-Damian v. INS,* 783 F.2d 931 (9th Cir. 1986).

Mr. Bandura has demonstrated the substantial prejudice he has suffered from the admission of the unauthenticated criminal "history." He accordingly is preparing a complaint to be filed with the Oregon State Bar Association and a Motion to Reconsider/Reopen with the BIA based on prior counsel's ineffective assistance. However, because Mr. Bandura is under a final order of deportation and is in custody on an INS detainer, he is compelled for emergent reasons to also raise this issue before this Court.

CONCLUSION

For the reasons set forth hereinabove, a Writ of Certiorari should issue to review the opinion and judgment of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 94-70352

ROBERT BANDURA,

Petitioner,

vs.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

Petition for Review of a Decision of the Board of Immigration Appeals argued and submitted October 17, 1995, Portland, Oregon

November 2, 1995

Before: WALLACE, Chief Judge, D.W. NELSON and BRUNETTI, Circuit Judges.

Robert Bandura petitions for review of the Board of Immigration Appeals' (Board) dismissal of his appeal from

the immigration judge's (IJ) decision holding him deportable under 8 U.S.C. § 1251(a)(2)(B)(i).

Bandura argues that the Board erred in considering an unauthenticated, hearsay list of prior convictions that was not before the IJ and that became part of the record after the IJ rendered his decision. Based in part on the listed convictions, the Board concluded that Bandura was a "menace on the road" and therefore denied relief under 8 U.S.C. § 1182(c) and affirmed the IJ's deportation order.

We review for abuse of discretion the Board's denial of an application for a waiver of deportability under 8 U.S.C. § 1182(c). *Vargas v. INS*, 831 F.2d 906, 908 (9th Cir. 1987). The Board's decision "will be upheld unless it is arbitrary, irrational, or contrary to law." *Padilla-Agustin v. INS*, 21 F.3d 970, 973 (9th Cir. 1994).

Bandura contends that the Board abused its discretion in basing its decision in part on the list of convictions. We hold that the Board acted well within its discretion in considering the list. First, the list of convictions was part of the record in front of the Board. Bandura did not object when the IJ augmented the record with the list of convictions. Nor did Bandura petition the Board for

rehearing once he realized that the Board based its decision in part on the list.

Second, the Board's consideration of the list did not prejudice Bandura. Hearsay evidence is admissible in an administrative hearing if it is probative and if admission is fundamentally fair. *Espinoza v. INS*, 45 F.3d 308, 310 (9th Cir. 1995). To be reversible error, Bandura must therefore show that the Board's use of the list was prejudicial. *Hernandez-Luis v. INS*, 869 F.2d 496, 498 (9th Cir. 1989). To show prejudice, Bandura must provide "concrete evidence" that the Board's error had the potential for affecting the outcome of the proceeding. *Id.*

Bandura failed to make this showing. He did not contend that the list of convictions was inaccurate. During cross-examination in front of the IJ, Bandura admitted that he had been convicted "half a dozen times" for driving under the influence of alcohol, that he had been convicted for driving with a suspended license, and that he had had other "driving offenses" in California. Although the Board relied on the list of convictions, Bandura's own admissions amply support the Board's conclusion that Bandura is a "menace on the road." Because the elements of the list on which the

Board relied were never contested, and because Bandura admitted to many of the convictions contained on the list, the Board did not abuse its discretion.

Bandura also argues that he was denied due process because he had no opportunity to confront the evidence against him. Due process is violated only where a procedural error causes an alien to suffer some prejudice. *Mohsseni Behbahani v. INS*, 796 F.2d 249, 250 (9th Cir. 1986). Bandura points to no evidence in the record that establishes that his inability to confront the charges on the conviction list was prejudicial.

PETITION DENIED.

Note: This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

U.S. Department of Justice
Executive Office for Immigration Review
Falls Church, Virginia

Decision of the Board of
Immigration Appeals

Date: April 7, 1994

File: A08 447 790 - Portland

In re: ROBERT BANDURA

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:
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Parker & Bush
1618 S.W. First Avenue, Suite 205
Portland, Oregon 97201-5709

ON BEHALF OF SERVICE:
Robert Peck
General Attorney

CHARGE:
Order: Sec. 241(a)(2)(B)(i), I&N Act [8 U.S.C. § 1251(a)(2)(B)(i))] - Convicted of controlled substance violation

APPLICATION: Waiver of inadmissibility

This is an appeal from the decision of an immigration judge dated June 4, 1992, finding the respondent deportable as charged, denying his application for a waiver of inadmissibility under section 212(c) of the Immigration and Nationality Act, 8 U.S.C. § 1182(c), and ordering him deported from the United States to Canada. The appeal will be dismissed.

The respondent is a 42-year-old native and citizen of Canada, who was admitted to the United States on March 2, 1953, as a lawful permanent resident. On December 6, 1990, the respondent was convicted in the Superior Court of Clark County, Washington, after a plea of guilty, of one count of unlawful possession of a controlled substance (cocaine), one count of unlawful possession of a controlled substance (methamphetamine), one count of escape, one count of tampering with a witness, and one count of bail jumping. He was sentenced to 16 months imprisonment on each count, sentences to run concurrently.

The Immigration and Naturalization Service issued an Order to Show Cause on April 25, 1991, charging the respondent with deportability from the United States under section 241(a)(2)(B)(i) of the Act, as an alien convicted of a violation relating to a controlled substance. At his deportation hearing the respondent conceded deportability but applied for a relief from deportation in the form of a waiver under section 212(c) of the Act.

Section 212(c) of the Act provides that aliens lawfully admitted for permanent residence, who temporarily leave the country voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of

7 consecutive years, may be admitted in the discretion of the Attorney General without regard to certain specified grounds for exclusion enumerated in section 212(a) of the Act. Through judicial interpretation, the section 212(c) waiver has become available to aliens not only in exclusion proceedings but also in deportation proceedings where the alien has not departed from the United States subsequent to the acts that rendered him excludable. *See Francis v. INS,* 532 F.2d 268 (2d Cir. 1976); *Matter of Silva,* 16 I&N Dec. 26 (BIA 1976).

The respondent in this case is statutorily eligible for a section 212(c) waiver in that he has been a lawful permanent resident for many more than the required 7 years. However, mere eligibility for a waiver does not automatically entitle the alien to a grant of such relief. Instead, a determination must be made whether the applicant merits the relief sought as a matter of discretion. The alien bears the burden of demonstrating that he warrants favorable consideration. *Matter of Marin,* 16 I&N Dec. 581 (BIA 1978).

The respondent testified in support of his waiver application that he was admitted to the United States as an immigrant in 1953, when he was 15 months of age. The respondent's birth mother in Canada could not keep her young son, so she gave him up for adoption to Esther and Denver Bennight, who raised the respondent as their own son. Other than a few brief trips to Canada, he has resided in the United States continuously since 1953.

The respondent is not married and does not have any children. He has an adopted sister who is a lawful

permanent resident, but the respondent did not mention whether he has any contact with her at all. He does see his parents often. The respondent works for his mother helping her to manage some rental property. He testified that he hires contractors to work on the properties and handles collections and qualification letters.

The respondent's mother testified that the respondent worked for her when he was in his early twenties, then went to live in California and Nevada for several years. She stated that he has been "trying pretty hard and he's doing pretty good" since his release from prison. He comes over often and cooks for them, and he lives in a house that they are buy together.

With respect to the negative factors, the respondent was convicted in 1990 of possession of cocaine and methamphetamine. He testified that he was involved in an accident, and when the police came, they found drugs in the car. He denies that the drugs belonged to him. He further denies that he was guilty of tampering with a witness (offering a police officer money to refrain from testifying against him), but he pled guilty to all counts because his former attorney coerced and threatened him to confess. He also stated that he was convicted of bail jumping and escape because his attorney did not tell him about the court dates, and the vice-president of the bond company which bailed him out told him he had a bad lawyer and advised him not to appear.

The respondent served 14 months of his 16-month sentence, then served 3 months on traffic charges of driving while intoxicated and driving with a suspended license. The

respondent's record is replete with driving violations dating back to 1977, mostly for drunk driving and driving with a suspended license. The Service submitted with a letter to the immigration judge a typed summary of unknown origin listing the respondent's convictions. This letter was submitted after the conclusion of the hearing but before the immigration judge handed down his decision. The Service presumably used this report to cross-examine the respondent. The respondent did not comment on this summary to the immigration judge or on appeal.

The "rap sheet" indicates that the respondent was arrested and convicted on six separate occasions in 1990 for driving while intoxicated, negligent driving, hit and run, driving with a suspended license, and speeding. In 1989, he was arrested and convicted four times for driving with a revoked license, driving while intoxicated, and reckless driving. Both in 1988 and in 1987, he was convicted for driving with a revoked license. In 1985, he was convicted of driving with a revoked license, reckless driving, and driving while intoxicated. In 1978, he was convicted on a weapons violation, and in 1977 he was convicted of criminal activity involving drugs. He also has three arrests in California and Nevada with no known disposition. The respondent could not remember some of these arrests during cross examination. He does acknowledge using different names during his life (Robert Bennight, his adoptive parents' name, Robert Bandura, his birth name, and Daniel Dickson, a name he used in California and Nevada), but denies that his intent was to conceal his criminal record.

Since his release from prison, the respondent has been in alcohol treatment as part of his community placement

sentence. He acknowledges problems with alcohol and hopes to curtail his drinking in the future, although his testimony in this regard was not terribly sincere. He acknowledged that even while on this program, he has not stopped drinking completely. The respondent has no apparent health problems, did not serve in the United States military, and did not present any evidence that he filed tax returns in this country.

The issue in this case is whether a discretionary grant of section 212(c) relief to the respondent is warranted. The exercise of discretion in a particular case requires consideration of all the facts and circumstances presented. There must be a balancing of the adverse factors evidencing the alien's undesirability as a permanent resident against the social and humane considerations presented in his favor. This Board has enunciated several such factors to be considered in determining whether an applicant warrants section 212(c) relief. Among the factors deemed favorable to an applicant are the presence of family ties within the United States, residence of long duration in this country, evidence of hardship to the alien and his family if deportation occurs, a history of employment, the existence of property or business ties, evidence of value and service to the community, proof of genuine rehabilitation if a criminal record exists, and other evidence attesting to an alien's good moral character. *Matter of Marin, supra,* at 584-85.

Adverse factors include the nature and underlying circumstances of the exclusion ground at issue, the presence of additional significant violations of this country's immigration laws, the existence of a criminal record, and, if so, its nature, recency, and seriousness, and the presence of

other evidence indicative of an applicant's bad character or undesirability as a permanent resident of this country. *Matter of Marin, supra,* at 584.

We also have pointed out that as the negative factors grow more serious, it becomes incumbent upon the alien to introduce additional offsetting favorable evidence, which in some cases may have to involve unusual or outstanding equities. *Id.* at 585. Such a heightened showing is required when an alien has been convicted of a serious offense, particularly one relating to the trafficking or sale of drugs. *Id.* at 586 n.4. The necessity of demonstrating unusual or outstanding equities is not exclusively triggered by serious crimes involving controlled substances, however. Rather, one must examine the gravity of the offense per se. *Matter of Buscemi,* 19 I&N Dec. 628 (BIA 1988); *see also Matter of Marin, supra.* In addition, such a showing may be mandated because of a single serious crime, or because of a succession of criminal acts which together establish a pattern of serious criminal misconduct. *Matter of Buscemi, supra.* We observe that an alien who demonstrates unusual or outstanding equities, as required, does not compel a favorable exercise of discretion; rather, absent such equities, relief will not be granted in the exercise of discretion. *Id.*; *see also Matter of Marin, supra.* There are cases in which the adverse considerations are so serious that a favorable exercise of discretion is not warranted even in the fact of unusual or outstanding equities. *Matter of Buscemi, supra*; *Matter of Marin, supra.*

With respect to the issue of rehabilitation, we noted in *Matter of Edwards,* Interim Decision 3134 (BIA 1990), that a clear showing of reformation is not an absolute

prerequisite to a favorable exercise of discretion in every case involving an alien with a criminal record. Rather, section 212(c) applications involving convicted aliens must be evaluated on a case-by-case basis, with rehabilitation a factor to be considered in the exercise of discretion. *Id.*

We have reviewed the proceedings in this case and agree with the immigration judge that the respondent did not establish that he merits a grant of section 212(c) relief. The respondent has been a lawful permanent resident for 41 years, since he was 15 months of age. Other than a few brief trips to Canada, he has not been outside the United States. We consider his residence in this country to be an unusual and outstanding equity. The respondent's parents are United States citizens, and the respondent is close to them. The respondent is not married and does not have any children. He has no family in Canada. His family ties in this country are a substantial equity.

The respondent works helping his parents manage some rental property. He did this for a while in his early twenties. During the years the respondent lived in California and Nevada, he had a small business making Swedish cabinets. He then returned to the State of Washington to continue with his parents business. The respondent presented no documentary evidence of his employment or of any tax returns he might have filed.

The respondent is likely to suffer some hardship upon deportation as he has lived his entire life in the United States. However, the respondent is young, skilled, and readily employable in Canada. Indeed, while he claims that he has no family in Canada, he has visited there and he has

maintained ties to his native country. He testified that while he had many opportunities to become a United States citizen, he did not do so because he did not want to give up his Canadian citizenship.

The respondent's mother testified that he comes to visit them and often cooks for them and helps her manage the business. Although the respondent does not support his parents, they have a close relationship. The respondent and his mother testified that they are buying a house together.

The respondent testified that he has been working steadily since his release from prison, and he attends his court-ordered alcohol rehabilitation as directed. However, the respondent completely denied any guilt with respect to his 1990 drug possession conviction and had no response to the obviously disturbing traffic record compiled by him over the years. We cannot therefore find that he has made a strong showing of rehabilitation. However, an overview of the respondent's equities indicate that they are outstanding equities.

Weighing against the respondent's equities is his conviction for drug possession, bail jumping, escape, and tampering with a witness. The respondent testified that he had been at the house of some friends and got involved in an accident when he left. When the police came, they apparently found some cocaine and methamphetamine. The respondent does not remember offering a police officer money to not testify against him, and he stated that he did not show up for his hearing because he had a bad lawyer. The respondent's conviction is certainly serious.

Further weighing against the respondent are his convictions for driving under the influence (six), driving with a revoked or suspended license (five), reckless driving (two), failing to have insurance, license, or registration (two), speeding, and hit and run. The respondent is undoubtedly a menace on the road, and it is by the grace of God that he has not killed himself or anyone else. His disrespect for our traffic laws and defiance in the face of a court-ordered prohibition against driving make the respondent undesirable as a resident of the United States. Even after the respondent had received an Order to Show Cause, putting him on notice that his very right to continue living in the United States was in danger, he suffered yet another conviction for driving under the influence and driving with a revoked license, for which he served 30 days in prison. This overall record is serious enough to tip the scales against him for a denial of section 212(c) relief, even in light of his outstanding equities.

On appeal the Service asks us to consider that the respondent was convicted in the State of Washington on September 23, 1993, of assault in the second degree after a jury trial, for which he received a sentence of 41 months imprisonment. The conviction record indicates that the respondent attacked a woman with a deadly weapon, a machete. The conviction appears to be on direct appeal. The respondent has not rebutted this evidence or commented on the conviction. As we have denied the respondent's application based on the record as it was before the immigration judge, we need not consider this evidence.

ORDER: The appeal is dismissed.

ACTING CHAIRMAN (sic) (signed) Fred W. Vacca

DISSENTING OPINION: Mary Maguire Dunne, Acting Chairman

I respectfully dissent.

The immigration judge denied section 212(c) relief concluding that the respondent's criminal record and lack of rehabilitation was not overcome by his equities. Based on the record as it existed before the immigration judge, I would have granted this alien a waiver under section 212(c) of the Act. The respondent's residence in the United States of 42 years, since the age of 1, and his strong ties to his United States citizen parents, are unusual and outstanding equities. Conversely, the respondent's deportable offense is simple possession of controlled substances and not trafficking. *See Matter of Marin,* 16 I&N Dec. 581 (BIA 1978); *Matter of Roberts,* Interim Decision 3148 (BIA 1991); *Matter of Edwards,* Interim Decision 3134 (BIA 1990). I would find that the respondent's equities do overcome his conviction.

The Service presented a typed list of unknown origin, after the close of the hearing, purporting to be a record of the respondent's traffic violations, which include several convictions for driving while intoxicated and driving with a suspended license. This document is not entitled to great weight as it was not submitted at the hearing and was not authenticated.

On appeal, the Service asks us to consider that the respondent was convicted in the State of Washington on September 23, 1993, of assault in the second degree, for which he received a sentence of 41 months imprisonment. The conviction appears to be on direct appeal. The

respondent has not rebutted this evidence or commented on the conviction. Such a final conviction would have an obvious negative hearing on any decision to grant relief, and as the immigration judge did not have an opportunity to review the evidence, I would remand the record on that basis.

ACTING CHAIRMAN (signed) Mary Maguire Dunne

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE IMMIGRATION JUDGE
PORTLAND, OREGON

File No.: A8 447 790 June 4, 1992

In the Matter of	)	
	)	
ROBERT BANDURA	)	IN DEPORTATION
	)	PROCEEDINGS
Respondent	)	

CHARGE: Section 241(a)(2)(B)(i), Immigration and Nationality Act [8 U.S.C. Section 1251(a)(11)] - Deportability related to controlled Substance Violation

APPLICATION: Relief under Section 212(c) of the Act [8 U.S.C. 1182(c)] - Returning resident to unrelinquished domicile.

ON BEHALF OF RESPONDENT:	ON BEHALF OF INS:
James L. Lane, Esq.	Virginia Miller Bedor, Esq.
1618 S.W. 1st Avenue, Ste. 205 Portland, Oregon 97201	P. O. Box 3361 Portland, Oregon 97208-3361

DECISION OF THE IMMIGRATION JUDGE

Respondent is a 40-year old unmarried male, native and citizen of Canada, who was admitted to the United States for permanent residence on March 2, 1953, at age 15 months. On April 25, 1991, a Form I-221, Order to Show Cause, was issued charging respondent with deportability under Section 241(a)(2)(B)(i) of the Act, based on a conviction relating to narcotics.

Respondent (through counsel) has admitted the allegations, conceded deportability, and now seeks relief under Section 212(c) based on 39 years of unrelinquished domicile. In order to establish such eligibility, he must establish such residence for no less than seven years. In addition, the Attorney General must also determine as a matter of discretion whether or not the respondent deserves such relief, and the alien bears the burden of demonstrating that his application merits favorable consideration. *See Matter of Marin,* 16 I&N Dec. 581 (BIA 1978). The adverse factor of a recent conviction for a serious offense does not preclude the respondent from presenting favorable evidence such as strong family ties in the Unites States, steady employment, hardship to himself and family, property ownership, and rehabilitation. My obligation is to balance the adverse and positive factors to determine if discretion is merited.

The facts in this case are not in dispute, but respondent's arrests are exceeded only by his excuses, e.g. alcohol and bad attorneys. Respondent testified that he entered a guilty plea on or about December 16, 1990, for five very serious offenses, and was sentenced to five 16-

month terms, to run consecutively. He blames the bail-jumping on an attorney who failed to notify him. He further testified that he is the general manager of a family-owned business.

On cross-examination, respondent conceded that he had used the name "Daniel Dickson" as a trade name, or as the Service would urge, "Dixon" was an alias that he gave the police. Respondent denied that he had used other names (e.g. "Bandura") to conceal his identity. Respondent is on his second six months of community placement. He has no children and has never been married. His adoptive mother keeps in touch with him, and testified that he does not support anyone but receives a salary from her. She also stated that, since he got out of jail, he is doing pretty good. He claims he was tricked into pleading guilty and professes no idea about any witness-tampering for which he was convicted on a plea of guilty. As for the cocaine conviction, he blames it on "two other guys," but he pled guilty. Respondent did, however, admit that he was an alcoholic in remission. However, in his sworn statement which was offered at trial (Exhibit 3, page 18), respondent admitted that on July 11, 1990, he had tried to bribe an officer to not testify against him. And the respondent further admitted (Exhibit 3, page 19) that fifteen months later (October 23, 1990) he escaped by failing to return to his release center; and five days later, failed to appear in court which constituted bail jumping.

It has recently been held that more serious negative factors require more outstanding or unusual equities. *See Matter of Buscemi,* 19 I&N Dec. 628 (BIA 1988). On this record, as a threshold requirement, respondent must establish

outstanding and unusual equities.

Respondent's equities are as follows: Practically his entire life in the United States since infancy and an adoptive mother who denounces drug use and cares about respondent. I find his many years in the United States to be an outstanding equity.

On the issue of rehabilitation, there is little or no evidence of any remorse. Respondent is apparently still in a state of denial; he cannot accept his culpability, and claims that he was tricked into pleading guilty. However, his own signed plea statement (Exhibit 3, pages 16-19) indicates he is less than a model citizen and has a problem accepting any personal responsibility for his actions or problems. And if he does not think he did anything wrong, then how can he be rehabilitated?

Based on the foregoing, I find that the favorable factors of a very long time in the United States and his United States citizen parent are far outweighed by the adverse factors of recent criminal misconduct plus lack of rehabilitation, and I therefore find that respondent does not merit the granting of his application for advance permission to return to unrelinquished domicile.

ORDER

IT IS ORDERED that the deportation proceeding of respondent not be terminated pursuant to Section 212(c) of the Immigration and Nationality Act, and that he be deported to Canada on the charge contained in the Order to Show Cause.

DATED the 8th day of June, 1992.

IMMIGRATION JUDGE (signed) Daniel L. Kahn